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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1937.

No. 882.

W. E. PAGE, Collector of Internal Revenue,
Petitioner,

versus

REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

and

AMICI CURIAE BRIEF.

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On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The undersigned move for permission to file the following Brief as Amici Curiae herein.

The question involved in the present case is whether the Government of the United States can compel the Regents of the University System of Georgia to collect a federal tax imposed on purchasers of tickets for admission to athletic events conducted by the Regents of the University System of Georgia and to pay over said tax to the Collector of Internal Revenue of the United States Government.

The undersigned are, respectively, attorneys for the State of Tennessee and the University of Tennessee. The University of Tennessee is the State University of Tennessee and has paid under protest to the Collector of Internal Revenue the tax on admissions to football games collected by the University of Tennessee under an arrangement similar to the one under which admissions were collected by the University System of Georgia. Hence the question involved in this case is, in most particulars, the same question involved in the controversy between the University of Tennessee and the Collector of Internal Revenue.

The attorneys for the respondent have consented in writing to the filing of a brief by the undersigned, and notice of this motion has been given to counsel for petitioner.

Witness our signature this 18th day of April, 1938.

ROY H. BEELER,
HENRY B. WITHAM,
Amici Curiae.

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AMICI CURIAE BRIEF.

OPINIONS BELOW.

This case was begun in the United States District Court, Northern District of Georgia, Atlanta Division, wherein defendant's motion to dismiss was granted. The opinion is reported as Regents of University System of Georgia v. Page, Collector of Internal Revenue, 10 F. Supp. 901 (1935). Plaintiff appealed, and the Circuit Court of Appeals reversed and remanded the cause. Regents of University System of Georgia v. Page, 81 F. (2nd) 577 (1936). Upon a rehearing the District Court granted a decree for the

plaintiff. Regents of University System of Georgia v. Page, 18 F. Supp. 62 (1937). Upon an appeal by defendant decree affirmed. Page v. Regents of University System of Georgia, 93 F. (2nd) 887 (1937). Petition for writ of certiorari granted by United States Supreme Court April 11, 1938.

QUESTION PRESENTED.

Whether the Government of the United States can compel the Regents of the University System of Georgia to collect a federal tax imposed on purchasers of tickets for admission to athletic events conducted by the Regents of the University System of Georgia and to pay over said tax to the Collector of Internal Revenue of the United States Government.

STATUTE INVOLVED.

The statute is Section 500 of the Revenue Act of 1926, 44 Stat. 91, amended by Section 711 of the Revenue Act of 1932, 47 Stat. 271, 26 U. S. C. A., Sections 940-944, inclusive, and imposes "A tax of 1 cent for each ten cents or fraction thereof of the amount paid for admission to any place * * * to be paid by the person paying such for admission." Exemptions do not include "admissions to any athletic game or exhibition the proceeds of which inure wholly, or partly, to the benefit of any college or university. * * *"

ARGUMENT.

An analysis of the question presented permits its breakdown into two subdivisions:

1. Is the conduct of athletic events by the Regents of the University System of Georgia a state "governmental" activity?

2. Is the federal tax a "burden" upon the exercise of a "governmental" activity?

IN REGARD TO SUBDIVISION NO. 1.

Education Is a Governmental Activity.

With the thought that perhaps judicial notice may not be taken that education is a governmental activity, the following citations are given:

Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 S. Ct. 495 (1937), dictum at p. 373.

Bauer v. State Board of Agriculture, 164 Mich. 415, 129 N. W. 713 (1911).

People v. Kewen, 69 Cal. 215, 10 P. 383 (1886).

People ex rel. Drake v. Regents, 4 Mich. 98 (1856).

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State ex rel. Black v. State Board of Education et al., 33 Idaho 415, 196 P. 201 (1921).

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State ex rel. Public Service Commission v. Brannon et al., 86 Mont. 200, 283 P. 202, 67 A. L. R. 1020 (1929).

Sterling v. Regents of the University of Michigan, 110 Mich. 369, 68 N. W. 253, 34 L. R. A. 150 (1896).

University of Tennessee v. People's Bank, 157 Tenn. 87, 60 S. W. (2nd) 328 (1928).

Wallace v. Regents, 75 Cal. App. 274, 242 P. 892 (1925).

Williams v. Wheeler, 23 Cal. App. 619, 138 P. 937 (1913).

The University System of Georgia Is Engaged in Education as an Arm of the State.

Georgia Code of 1933, Title 32, Chapter I.

State of Georgia v. Regents of the University System of Georgia, 179 Georgia 210, 175 S. E. 567 (1934).

A Comprehensive System of Public Education Includes Physical Education and Athletics.

Spencer v. School District No. 1, 121 Ore. 511, 254 P. 357 (1927), in which an action for personal injuries based upon the negligence of a school district in placing a radiator in the gymnasium hall used in connection with the school was decided favorably to the school district on the theory that the school was engaged in a governmental activity.

Mokovich v. Independent School District No. 22, 177 Minn. 446, 255 N. W. 292 (1929), in which an action was brought against the school district for injuries suffered by plaintiff, a member of the football team of the school operated by the defendant. The decision in this case was favorable to the school district on the theory that athletic games and other contests were a part of its educational system.

Anderson v. Board of Education, 49 N. D. 181, 190 N. W. 807 (1922), in which it was held that the Board of Education was exercising a governmental function in providing equipment for playground use.

State ex rel. School District v. Superior Court, 69 Wash. 189, 124 P. 484 (1912), in which it was held that a school district may use the power of eminent domain to acquire lands for playgrounds which might be used for the common athletic games current among schools of that class.

People v. Pommerening, 250 Mich. 391, 230 N. W. 194 (1930), in which it was held that the University of Michigan could condemn land for a golf course.

German Gymnastic Association v. City of Louisville, 117 Ky. 958, 80 S. W. 201 (1904), in which it was held that a gymnasium association should be exempt from taxation. The Court said:

> Education is not confined to the improvement and cultivation of the mind. It may consist in the cultivation of one's religious or moral sentiments. It likewise may consist in the development of one's physical faculties. Those in charge of colleges and institutions of learning recognize this to be true. Their students are taught, not only the dead and modern languages, mathematics, and the sciences, etc., but the Bible and Christian evidences, and a gymnasium is maintained, and football and other athletic sports are encouraged. The cultivation of the mind, the improvement of our moral and religious natures, and the development of our physical faculties are necessary to perfect education. The framers of the Constitution did not use the term in such a restricted sense as to exclude exercises which tend to develop strength. This is of as much importance to the State as is the acquisition of a knowledge of Latin, Greek, mathematics, etc. * * *

> If one institution affords an opportunity to acquire this perfect education, it is one of education. If three institutions are organized—one seeking by a course of instruction to cultivate the mind, one by a method of instruction to improve students' religious or moral conditions, and another to teach physical culture to produce a better physical development—each is an institution of education, as much as the one at which the student can acquire the threefold knowledge. It is simply a matter of judgment or convenience, on the organization of institutions of education, whether one shall furnish all the opportunities for the acquisition of an education or whether there shall be separate institutions for that purpose. Our conclusion is that the appellant is an institution of education, not employed for gain, and is exempt from taxation.

Since a comprehensive system of public education includes physical education and athletics, and since the University System of Georgia is engaged in education, and since education is a governmental activity, it must therefore follow that the conduct of athletic events by the Regents of the University System of Georgia is a "governmental" activity of that state.

IN REGARD TO SUBDIVISION NO. 2.

Admittedly every activity in which a state may engage is not nontaxable. If the state has "stepped down" and engaged in an enterprise which is essentially private business it may be taxed by the Federal Government.

> South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110 (1905).

But it should be pointed out that such a tax is allowed, not because it is not burdensome upon a state function, but

because it is a state function which is not "governmental." Hence **South Carolina v. The United States** is not in point in the instant case.

Any Tax on a State "Governmental" Activity Is a Burden.

Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 57 S. Ct. 495 (1937). The Court said, at page 364 of the official report:

> But a federal tax in respect of the activities of a state or a state agency is an imposition by one government upon the activities of another, and must accord with the implied federal requirement that state and local governmental functions be not burdened thereby. So long as our present dual form of government endures, the states, it must never be forgotten, "are as independent of the general government as that government within its sphere is independent of the states." * * * And, as it was said in **Texas v. White**, and often has been repeated, "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government." The unimpaired existence of both governments is equally essential. It is to that high end that this court has recognized the rule, which rests upon necessary implication, that neither may tax the governmental means and instrumentalities of the other. * * *

The Extent of the Tax Is Not Determinative of the Right to Impose It by Either the State or the Federal Government Upon "Governmental" Enterprises of the Other.

Indian Motorcycle Co. v. United States, 283 U. S. 570, 51 S. Ct. 609 (1931).

Pan Handle Oil Co. v. Knox, 277 U. S. 218, 48 S. Ct. 451 (1928).

Ambrosini v. United States, 187 U. S. 1, 123 S. Ct. 1 (1912).

Since any tax, regardless of size, upon the exercise of "governmental" activity is, to the extent of the tax, a control of that "governmental" activity, it follows that it is a burden which cannot be imposed. Therefore the federal tax sought to be imposed upon a "governmental" activity of the State of Georgia is a burden and unconstitutional.

CONCLUSION.

In view of the foregoing, we respectfully submit that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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NAT TIPTON,
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